ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A)	)	**CC Docket No. 96-187**
of the Telecommunications Act of 1996	)	

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel") provides the following comments in the above-captioned matter. As the principal industry association of the competitive telecommunications industry, CompTel's members are both competitors and customers of local exchange carriers ("LECs"). These companies thus rely on LEC tariffs to protect them from discrimination and to detect and deter anticompetitive practices. Consequently, CompTel's members have a keen interest in any Commission action which streamlines the LEC tariff process.

I. Tariffs Which Are "Deemed Lawful" Should Not Be Construed To Change The Status Of Tariffs That Become Effective Without Suspension and Investigation

The Notice of Proposed Rulemaking ("NPRM") initiating this proceeding considers two alternative constructions of the term "deemed lawful" as it is used in Section 204(a)(3). (¶¶ 8-15.) The first alternative reading would change the legal status of tariffs that become effective without suspension or investigation. Under this definition, long-

standing law would be abandoned[1] and mere Commission inaction in response to a tariff filing would be elevated to the level of an affirmative finding of lawfulness. Any subsequent challenge to the tariff in a complaint proceeding would be precluded from permitting a recovery of damages by this interpretation.

This construction of new Section 204(a)(3) goes far beyond a reasonable reading of the language of the statute or Congressional intent. As the NPRM noted, this new Section greatly accelerates the effective dates for LEC tariff filings and apparently precludes application of the 120-day notice requirement of Section 203(b)(2) to those tariffs. This alone is a major shift in established Commission practices dealing with LEC tariffs. This language should not be read also to reverse decades of basic tariff law concerning the legal effect of Commission inaction unless the language of the statute or its legislative history make this revision abundantly clear. This is not the case.

Denial of damages from successful tariff challenges after a tariff had taken effect without FCC action would represent a major setback to consumers rights. For example, a rate increase submitted in violation of price cap requirements, if allowed to take effect by Commission inaction, could be effective for months or longer before a hearing could be concluded to find it unlawful. At the end of the hearing, the offending LEC would be ordered to revise its tariff, but would be permitted to keep its unlawful revenues. Coupled with the

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[1] See *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 730 (9th Cir. 1981) ("the Commission is not required under law to pass any judgment on a proposed tariff, and it does not necessarily approve as agency policy the content of every tariff permitted to go into effect"); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040; *Associated Press v. FCC*, 448 F.2d 1095 (D.C. Cir. 1971).

extremely short review periods dictated by this new Subsection, consumers would have little recourse when victimized by an overpriced LEC offering. Equally important, knowing that no refunds could be ordered and that review times are minimal, LECs would have new-found incentives and opportunities to file tariffs with questionable rates or terms and conditions.

The second alternative definition of "deemed lawful" is much more reasonable and logical. The suggestion that the phrase "unless the Commission takes action" modifies "shall be effective" but not "deemed lawful" is persuasive. The proper reading of Section 204(a)(3) is that it creates a presumption of lawfulness for affected LEC tariff filings, but does not insulate them from refunds or damages whenever a tariff is subsequently found to be unlawful. This interpretation gives effect to the language of the new statutory provision without completely trampling consumer rights or abandoning longstanding and fundamental Commission policy.

II. LEC Tariffs Eligible For Streamlined Treatment

A. Section 204(a)(3) Does Not Apply To Tariffs For New Services

The NPRM asks whether the "new or revised" language in Section 204(a)(3) applies to tariffs for existing services only or also includes tariff filings covering new services. (¶¶ 16-19.) CompTel agrees with the Commission's statement that the better reading of this language is that it does not apply to filings for new services.

The Section applies to "new or revised charges, classifications, regulations or practices," and sets specific timeframes for "a reduction in rates" or "an increase in rates." This provision is described by the Joint Explanatory Statement of the Committee of

Conference as "regulatory relief that streamlines the procedures for revision by local exchange carriers of charges, classifications and practices under Section 204 . . . ."[2] Obviously, tariffs for new services cannot be "revisions" to existing tariff provisions.

Similarly, the new statutory language refers to "a" new or revised "charge, classification, regulation or practice"; this use of the singular also suggests that revisions to existing tariffs are covered but not new tariffs for new services. The Congress could easily have used the plural "new or revised charges, classifications or regulations or practices" if it had intended for new tariffs for new services to be included.[3]

The Commission also should make clear that the exclusion of tariffs for new services cannot be eluded by the simple device of filing new services as "revisions" to existing tariffs. A new service is outside the scope of Section 204(a)(3) regardless of whether it is added to an existing tariff or contained in a wholly new tariff.

B. Section 204(a)(3) Precludes FCC Forbearance From Covered Tariff Filings

The NPRM tentatively concludes that Section 204(a)(3) does not preclude the Commission from exercising its forbearance authority to establish permissive or mandatory detariffing for LEC services. (¶ 19.) CompTel disagrees.

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[2] Joint Explanatory Statement of the Committee of Conference at 69 (emphasis added).

[3] In determining which tariff filings are covered by this Section, the Commission can rely on those portions of its price cap rules which define "new services." Any tariff filing for a "new service" is not covered by Section 204(a)(3).

Section 10(a) of the Telecommunications Act of 1996 allows the Commission to forbear from imposing any of its requirements upon the making of certain findings. This general provision is overridden, however, by the specific language of new Section 204(a)(3), which requires LEC tariff filings. Statutory construction principles mandate that specific provisions are to take precedence over more general ones.[4] Section 204(a)(3) thus represents a Congressional presumption that the finding required by Section 10(a) as a prerequisite to detariffing cannot be made in the case of LEC tariffs covered by Section 204(a)(3).

Moreover, if the Commission were empowered by Section 10(a) to remove LEC tariff filing requirements entirely, the reduced notice periods of Section 204(a)(3) would become a nullity. Again, long-established principles of legislative interpretation direct that a statute be read to give meaning to each of its provisions.[5]

III. Streamlined Administration of LEC Tariffs

A. Post-Effective Review

The NPRM also asks whether the Commission should rely exclusively on post-effective review of tariff filings covered by the abbreviated timeframes of Section 204(a)(3). (¶¶ 23-24.) The answer to this question depends, in part, on the definition of "deemed lawful."

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[4] See *United States v. Chase*, 135 U.S. 255, 260 (1890); *Mail Order Association of America v. U.S. Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993).

[5] See *Mail Order Association of America v. U.S. Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1285 (D.C. Cir. 1983).

If the Commission determines that "deemed lawful" means that an affirmative finding of lawfulness is in effect and no damages may be awarded to complainants, then a reliance on post-effective review is particularly inappropriate. Consumers would be entirely stripped of any protection from LEC tariff filings if they were given the force of an affirmative finding of lawfulness and reviewed only after taking effect.

This problem would be compounded by the fact that the Commission cannot suspend a tariff after it has become effective. Thus, reliance on post-effective review would mean that the tariff would remain in effect, with no damages possible, until a hearing was completed.

Even if the Commission adopts the definition of "deemed lawful" which allows for later refunds, post-effective review is not the preferred approach. As discussed above, the Commission loses its legal authority to suspend a tariff once it has taken effect. Thus, post-effective review would nullify this consumer aspect of the Act.

The filing period requirements proposed in the NPRM for petitions against tariffs -- 3 days for tariffs on 7 days notice -- are acceptable in light of the brief time available. (¶ 28.) While in fact it is nearly impossible to obtain a tariff, analyze it and write and file a petition in three days, the timeframe allowed by the statute provides little choice. Put simply, the three day review period is better than nothing.

B. Pre-Effective Review

CompTel endorses the proposal contained in the NPRM concerning the creation of a presumption of unlawfulness for certain categories of tariff filings. (¶ 25.) This

approach will enable the Commission to serve its dual mandates of protecting consumer interests while expediting the tariff process for LECs. CompTel also agrees that tariffs which facially fail to comply with the price cap rules should be among those presumed unlawful. (¶ 25.)

CompTel also agrees with the NPRM's tentative conclusion that the 15 day notice should apply to tariff filings that include both rate increases and rate decreases. (¶ 26.) Any other conclusion would enable LECs to file rate increases on less than the 15 days required by the statute. As the NPRM points out, LECs may ensure that rate decreases get the benefit of the shorter seven day notice period by filing them separately from increases.

C. Annual Access Filings

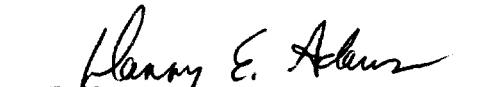
The proposal in the NPRM to require the filing of tariff review plans ("TRP") in advance of the actual tariffs for annual access filings is an important principle which should be adopted. (¶ 31.) This approach is certainly within the Commission's jurisdiction as part of its regulatory oversight of access tariffs and will enable both the Commission and consumers to review the information fully before being required to analyze the massive annual tariff filings. To enforce this requirement, the Commission should include annual access tariffs filed without proper prior notice of the TRP among those presumed unlawful.

Conclusion

For all the foregoing reasons, the Commission should adopt the policies and rules proposed in the NPRM, as modified by the preceding comments.

Respectfully submitted,

**THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION**

By: 

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